STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 2006
v	No. 260837 Oakland Circuit Court
DONALD DWAYNE HAMMOND, Defendant-Appellant.	LC Nos. 98-158731-FH; 98-157389-FH

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

A jury convicted defendant of two counts of possession with intent to deliver 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii),[1] and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant as a repeat controlled substance offender, MCL 333.7413(2), to consecutive prison terms of 10 to 40 years for each of the cocaine convictions, and one day in jail for the marijuana conviction. The trial court denied defendant's postjudgment motions for a new trial. This Court granted defendant's delayed application for leave to appeal, and we affirm.

I. Facts

On January 2, 1998, the Auburn Hills police had information that a male named "Donald," employed by the Auburn Hills Courtyard Marriott hotel, possessed a large amount of cocaine and would be picked up from work by a woman driving an unidentified car at 7:00 a.m. Auburn Hills Police Sergeant Steven Groehn positioned himself on a service drive near the hotel, and instructed Officer David Miller to patrol the area of Opdyke Road and University Drive. At about 7:00 a.m., Groehn was informed that a car being driven by a female had briefly stopped in front of the hotel. Groehn pulled adjacent to the car at a traffic light, observed the occupants, and also saw that defendant was not wearing a seatbelt. Groehn radioed Miller to stop the car. Miller testified that he saw a green Pontiac Grand Am turn onto Opdyke Road from Amy Lane, a

[1] After the charged offense was committed, MCL 333.7401 was amended by 2002 PA 665 to reclassify the amounts of controlled substances. The current version of MCL 333.7401(2)(a)(iii) applies to amounts of 50 or more but less than 450 grams of a controlled substance.

private drive, without first making a complete stop. Miller stopped the car for a traffic violation, although Groehn had also directed him to stop the car.

Defendant was the front seat passenger in the car, a woman was driving, and another individual was in the rear seat. Miller spoke with the driver, while Groehn questioned defendant and ultimately asked him to get out of the car. Groehn indicated that, after defendant exited the car, he attempted to flee and a struggle ensued between himself and defendant. Miller observed defendant and Groehn wrestling, so he and Officer Jeffrey Walker assisted Groehn in restraining and then arresting defendant for assaulting a police officer. Walker searched defendant, felt a large hard object in defendant's coat pocket, thought it was a gun, and yelled his belief to Miller. Defendant then stated, "[N]o, you got me, it's just a big bag of dope not a gun." The police seized a large bag of cocaine from defendant's coat pocket, two additional bags of cocaine and $1,296 from defendant's pants pockets, a digital scale with white residue on it from the floorboard of the front passenger seat, a cellular telephone, and a pager. In total, the three bags contained 104.90 grams of cocaine.

After defendant's arrest, Groehn contacted Pontiac Police Officers James Martinez and Robert Miller. Martinez testified that Groehn advised him that defendant wanted to reveal information to the Pontiac police. The Pontiac police officers met with defendant. According to the officers, defendant indicated, inter alia, that his street name was "Chill,"[2] and that he had hidden a half-kilogram of cocaine, but would not reveal its location. Subsequently, the Pontiac police obtained and executed a search warrant at defendant's Waterford Township apartment, and seized approximately 75 grams of cocaine, 1.4 grams of marijuana, drug tally sheets, and approximately $4,000. In a statement to the police, defendant admitted that he had approximately three ounces of cocaine in his apartment, that he had been selling cocaine for eight years, and that he sold about a quarter of a kilogram weekly.

II. Motion to Suppress

Defendant argues that the stop of the car in which he was a passenger was illegal and, therefore, any evidence seized after the stop should have been suppressed. We disagree.

This Court reviews a trial court's factual findings on a motion to suppress for clear error, but the court's ultimate decision is reviewed de novo. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). Clear error exists where this Court is left with the definite and firm conviction that a mistake has been made. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

The Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11, guarantee the right of persons to be secure against unreasonable searches and seizures. *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). An arrest or stop cannot be used as a pretext to search for evidence of a crime. *People v Haney*, 192 Mich App 207, 209; 480 NW2d 322 (1991). In order to make a lawful stop of a vehicle, a police officer must have a

[2] The Pontiac police had been conducting a narcotics investigation involving a suspect named Chill.

particularized suspicion or probable cause, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal activity. *People v Peebles*, 216 Mich App 661, 664-665; 550 NW2d 589 (1996). The totality of the circumstances should be considered when assessing a police officer's suspicion of criminal activity. *Id.* at 665.

Here, Officer David Miller explained that he stopped the car in which defendant was a passenger because it failed to come to a complete stop before it turned onto Opdyke Road from Amy Lane, which was a traffic violation. A traffic violation presents sufficient probable cause to justify an investigatory stop of a vehicle if the circumstances create a reasonable suspicion that a traffic offense has been committed or is being committed. *Kazmierczak*, *supra* at 420 n 8.

Defendant argues that "[t]he only justification for the stop was failure to stop at a stop sign. However, since there was no stop sign at the intersection, and that was the basis for the stop, the officers did not have a lawful basis for stopping the vehicle." But MCL 257.652(1) provides that "the driver of a vehicle about to enter or cross a highway from an alley, private road . . . *shall* come to *a full stop* before entering the highway[.][3] (Emphasis added.) Subsection (2) of the statute provides that a violation of this requirement is a civil infraction. MCL 257.652(2). Regardless of the officer's alleged subjective intent in making the stop, if his actions constitute "no more than [he is] legally permitted and objectively authorized to do," the stop will be considered constitutionally valid as "necessarily reasonable under the Fourth Amendment." *Haney*, *supra* at 210.

Further, Officer Groehn testified that, after the stop, he asked defendant for identification related to his failure to wear a seatbelt. When defendant could not produce any identification, Groehn asked defendant to step out of the car. Defendant thereafter assaulted Groehn, and was arrested for assaulting an officer. Following defendant's arrest, the police properly could search defendant without a warrant incident to that arrest. *People v Catanzarite*, 211 Mich App 573, 581; 536 NW2d 570 (1995).

Because the police were legally permitted to effectuate a stop of the car on the basis of the observed traffic violation, the stop was constitutionally valid and cannot be considered a mere pretext, despite any alleged additional subjective motivations the officers may have harbored in effectuating the stop. Therefore, the trial court did not err when it found that the stop was valid, and denied defendant's motion to suppress the evidence on this basis.[4]

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[3] A "highway" is a publicly maintained road open to the use of the public for vehicular travel. MCL 257.20.

[4] Contrary to defendant's argument, the trial court did not err when it found, in the alternative, that the totality of the circumstances supported Groehn's suspicion of criminal activity, and, thus, an investigatory stop was valid. At the evidentiary hearing, Groehn testified that he directed Miller to make an investigative stop of the car. He explained the information that he had received from a confidential informant on the day of the stop. The information included the suspect's location, a detailed description, and the fact that a woman would be picking him up at a specified time. Groehn also explained that the informant had done work for other undercover officers and was reliable.

III. Identity of Confidential Informant

Defendant says that the trial court erred when it denied his posttrial request to compel the prosecutor to reveal the identity of the confidential informant. We review the trial court's denial of a motion to disclose the identity of an informant for an abuse of discretion. *People v Rodriguez*, 65 Mich App 723, 728-729; 238 NW2d 385 (1975).

A court may compel an informant's disclosure when "disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *People v Underwood*, 447 Mich 695, 704; 526 NW2d 903 (1994) (citation omitted).

> [N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. [*Id.* at 705.]

If a defendant is able to demonstrate a possible need for the information requested, the trial court should conduct an in-camera hearing to determine whether the informant could offer any testimony helpful to the defense. *Id.* at 706. Here, defendant has not provided a reasonable explanation for why disclosure of the informant's identity would have been helpful to his defense. Therefore, we reject this claim of error.

IV. Right of Confrontation

Defendant contends that an officer's testimony was based on impermissible hearsay, and violated his right of confrontation under *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because defendant failed to raise this issue below, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

In *Crawford*, *supra* at 59, the United States Supreme Court stated that, for purposes of the Sixth Amendment Confrontation Clause, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." However, the Confrontation Clause does not bar the use of testimonial statements for a purpose other than to establish the truth of the matter asserted. *Id.*; *People v McPherson*, 263 Mich App 124, 134; 687 NW2d 370 (2004).

Crawford is not implicated here because the contested statements are not hearsay. Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998). During trial, the challenged testimony was not attributed to a confidential informant or any other declarant. Officer Groehn testified that he was in the area because he had "received information," and described why he was watching the hotel. The

challenged testimony was not offered to prove the truth of the information received. Rather, the information explained Groehn's conduct when he positioned himself outside the hotel, as well as his subsequent action of pulling up next to the car to observe the occupants. Because the statements were presented for the limited purpose of providing background information, they did not constitute hearsay, or statements of an absent declarant such that defendant's confrontation rights were violated. Consequently, defendant has not shown plain error.

V. Search Warrant Affidavit

Defendant maintains that the trial court erred when it denied his motion to suppress evidence seized during the search of his apartment because the search warrant affidavit did not provide sufficient facts to find that the information supplied was reliable, and the information was also stale.

A search warrant may not issue unless probable cause exists to justify the search. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *Kazmierczak*, *supra* at 417-418. The magistrate's findings of probable cause must be based on the facts related within the affidavit. MCL 780.653; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). In assessing a magistrate's decision with regard to probable cause, a reviewing court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner, giving deference to the conclusion that probable cause existed, and determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for a finding of probable cause. *People v Russo*, 439 Mich 584, 603-605; 487 NW2d 698 (1992); *People v Poole*, 218 Mich App 702, 705; 555 NW2d 485 (1996).

While the passage of time is a valid consideration in deciding whether probable cause exists, the measure of the staleness of information in support of a search warrant rests on the totality of the circumstances, including the criminal, the nature of the property sought, the place to be searched, and the character of the crime, e.g., "whether the inherent nature of a scheme suggests that it is probably continuing." *Russo*, *supra* at 605-606; *People v McGhee*, 255 Mich App 623, 636; 662 NW2d 777 (2003).

Here, a confidential informant provided information regarding suspected drug trafficking in the apartment. A search warrant affidavit may be based on information supplied by a confidential informant if the affidavit contains "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653; *Poole*, *supra* at 706. A finding of personal knowledge should be derived from the information provided and not merely from a recitation that the informant had personal knowledge. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). Further, "[i]f personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge." *Id*.

The disputed search warrant affidavit provided sufficient facts from which a magistrate could conclude that the information supplied by the confidential informant was reliable. The affiant, Officer Robert Miller, a member of the Narcotics Enforcement Section, stated that he

"has been conducting a continuing investigation concerning illegal drug trafficking" concerning defendant, also known as "Chill." The affiant stated that the police received information from a confidential informant that, during the past two months, the informant had purchased cocaine from "Chill" at the apartment, which the informant immediately gave to the affiant. The affiant stated that he "knows the informant to be reliable," that over the past 49 months the informant had purchased narcotics on 87 occasions, and that the informant "has provided true and accurate details concerning drug trafficking in the Pontiac area." On December 23, 1997, the informant personally observed approximately one kilogram of cocaine inside the apartment. On January 2, 1998, defendant was arrested and had 110 grams of cocaine in his possession. The affiant further indicated that, after defendant's arrest, defendant spoke with Pontiac police officers and revealed that he had approximately a half-kilogram of cocaine stored at an undisclosed location. The affiant stated that, based upon a prior investigation, he believed that cocaine may be located at defendant's apartment. The affiant listed the steps taken to confirm that defendant is the "listed renter" of the apartment. The search warrant was issued on January 2, 1998.

Considering the continuing nature of the crime of drug trafficking and the date of the issuance of the search warrant, which was ten days after the informant observed cocaine in defendant's apartment and the same day that defendant stated that he had a half kilogram of cocaine hidden at an undisclosed location, the information in the search warrant affidavit was not stale. Moreover, viewing the search warrant and affidavit in a commonsense and realistic manner, and giving deference to the magistrate's conclusion, there was a substantial basis for the magistrate to determine that there was probable cause to believe that controlled substances would be found at the location. The trial court properly denied defendant's motion to suppress on this basis.

VI. Motion to Suppress Defendant's Statements

We reject defendant's claim that the trial court improperly admitted his statements to the police, which were given before he received *Miranda*[5] warnings. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996); *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

The first statement that defendant challenges occurred at the time of his arrest when an officer patted him down, and yelled that defendant may have a weapon. Defendant then stated, "[N]o, you got me, it's just a big bag of dope not a gun." There is no dispute that defendant did not receive his *Miranda* warnings before he made this statement. But "[i]t is well established that *Miranda* warnings need be given only in situations involving custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* There is no indication that the officers asked defendant any questions or performed any other action to induce the statement. Statements made voluntarily by suspects in custody do not fall with the purview of

[5] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Miranda, and are admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Accordingly, the trial court did not err when it denied defendant's motion to suppress this statement.

Defendant also challenges his statement made at the Auburn Hills police station that he had a half kilogram of cocaine at an undisclosed location. At the evidentiary hearing, Officer Groehn testified that he advised defendant that he would be charged with an offense that carried a ten-year minimum sentence. Defendant indicated that he would be interested in cooperating and talking to a Pontiac narcotics officer. Officer Martinez testified that, after he received a call from the Auburn Hills police that defendant wanted to talk, he and his partner met with defendant. They told defendant that if he cooperated, they would inform the judge at sentencing, but could not make any promises. Martinez described the conversation as casual, and indicated that they asked defendant basic questions, and defendant indicated that he wanted to work with the officers. During the conversation, defendant voluntarily stated that his street name was "Chill," he identified people involved in drug trafficking, and he said that he had hidden a half kilogram of cocaine. Martinez noted that because defendant would not divulge the location of the cocaine, he told him that they could not work together. Martinez explained that it is "common procedure" not to read a suspect his *Miranda* rights when the suspect is providing information about other incidents, not the one for which he was arrested. The police subsequently executed a search warrant at defendant's apartment, and seized cocaine and a large sum of money. The police returned and read defendant his *Miranda* rights, which he then waived. Defendant then stated that he had approximately three ounces of cocaine in his apartment, made about $1,000 a day, had been selling cocaine for about eight years, and sold between a quarter and a half kilogram a week. Defendant did not testify at the evidentiary hearing.

Defendant now claims that he is entitled to a new trial because his involuntary, "un-*Mirandized*" statement was used to obtain the affidavit to search his apartment and therefore the search was illegal. Indeed, the only inculpatory information defendant gave to the police before the police read him his *Miranda* rights was that he had hidden a half kilogram of cocaine at an undisclosed location. Even if defendant's statement was made in violation of his *Miranda* rights, the evidence seized from his apartment need not be suppressed. Even without defendant's inculpatory statement, under the totality of the circumstances, the information provided by the affiant in the search warrant affidavit, see part V, *supra*, provided sufficient information to believe that defendant was involved with drug trafficking, that he was renting the apartment to be searched, and that evidence of drug trafficking could be found in that apartment. Therefore, defendant is not entitled to any relief on this basis.

VII. Drug Profile Evidence

Defendant also asserts that the trial court abused its discretion by allowing impermissible drug profile evidence.

Officer Groehn, who was qualified as an expert in the field of drug trafficking, testified that, in light of the evidence seized from defendant at the time of his arrest and the lack of drug use paraphernalia, the amount of cocaine at issue was not consistent with personal use, but was "for manufacturing and delivery." Similarly, Officer Martinez, who was also qualified as an expert in the field of drug trafficking, opined that, given the evidence seized from defendant's

apartment, i.e., the amount of cocaine, a large sum of money, and tally sheets, in addition to the absence of paraphernalia for ingestion of cocaine, the amount of cocaine at issue was not consistent with personal use, but was intended for distribution. In response to defendant's objections, the trial court noted that MRE 704 allowed the evidence, and explained to the jury that the witnesses' opinions are not directly related to defendant or any particular individual, but in light of the totality of the circumstances, concerns "the cocaine itself, not an individual."

"Drug profile evidence has been described as an 'informal compilation of characteristics often displayed by those trafficking drugs.' " *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug profile evidence may be admitted if (1) it is offered as background or modus operandi evidence, and not as substantive evidence of guilt; (2) other evidence is admitted to establish the defendant's guilt; (3) the appropriate use of the profile evidence is made clear to the jury; and (4) no expert witness is permitted to opine "that, on the basis of the profile, the defendant is guilty," or to "compare the defendant's characteristics to the profile in a way that implies that the defendant is guilty." *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000). Expert testimony is admissible if the expert is qualified, the evidence gives the trier of fact a better understanding of the evidence or assists in determining a fact in issue, and the evidence is from a recognized discipline. *Murray*, *supra* at 52-55.

The challenged testimony is not the kind of "drug profile evidence" condemned for use as substantive evidence of guilt. See, e.g., *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). Rather, the officers' knowledge of the drug trade was used to help the jury understand the significance of the amount of cocaine at issue. Expert police testimony regarding the quantity of drugs found and the packaging is permitted to show that the defendant intended to sell the drugs and not simply use them for personal consumption. See *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Accordingly, the trial court did not abuse its discretion when it admitted the evidence.

VIII. Prosecutorial Misconduct

We reject defendant's claim that the prosecutor infringed on his right not to testify, and improperly bolstered the police witnesses. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant failed to object to some of the prosecutor's conduct below. We review those unpreserved claims for plain error affecting substantial rights. *Carines*, *supra*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford*, *supra*.

Defendant contends that the prosecutor infringed on his right not to testify when the prosecutor remarked during closing argument that "[t]he evidence that's been produced has not been controverted." A prosecutor may not comment on a defendant's failure to testify because such an argument infringes on the right against self-incrimination. *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993). But it is permissible for a prosecutor to observe that evidence against a defendant is undisputed. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Moreover, if the challenged remarks could be viewed as improper, any prejudice could have been cured by a timely instruction. *Schutte*, *supra* at 721. Indeed, the trial

court instructed the jury that defendant did not have to offer any evidence or prove his innocence, that defendant has an absolute right not to testify, and that the jury is not to consider that fact. The instructions were sufficient to dispel any possible prejudice, *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), and juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant has not demonstrated a plain error affecting his substantial rights. *Carines, supra*.

Defendant also claims that, in the following excerpt from rebuttal argument, the prosecutor impermissibly bolstered the police officers' credibility:

> [*The prosecutor*]: Now, somebody can stand up and he can object or the Court can correct me if I'm wrong, but the things that he talked about where [sic] like the stop, the statements they made, those are legal issues. There's volumes on the second floor of the building across the street, volumes, [sic] of transcripts and law and legal decisions from Supreme Court on do [sic] to see if things were appropriate or not appropriate. Separate hearings with all kinds of other evidence are heard. I've got a box -
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> [*Defense counsel*]: Excuse me, Your Honor, that's irrelevant, immaterial to this proceedings.
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> [*The trial court*]: Okay. Let's tighten it up please. Go ahead. I don't know what's in the other building. Well, I should say - I do know what's in it but I just don't want to bring it in to this case. Go ahead, sir.
>
> [*The prosecutor*]: The bottom line is those are matters that are decided by the law.

Improper bolstering of the credibility of a prosecution witness may constitute prosecutorial misconduct. See *People v Malone*, 180 Mich App 347, 361; 447 NW2d 157 (1989). However, the prosecutor's comments must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Viewed in context, the prosecutor did not suggest that the jury should convict defendant on an improper basis. Rather, the remarks were focused on refuting defense counsel's assertions during closing argument that the police had acted improperly in investigating defendant,[6] and

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[6] Defense counsel stated:

> There's a guy that's selling a quarter kilo a week for eight years going to sit down and tell the police this is what I've been doing and there's nothing in return for him. Do you believe that the police didn't offer him something? So you believe that the police didn't promise him something? So you believe that the police didn't have some kind of deal with this guy? If you do, then you do? I'm

(continued…)

emphasized that certain issues were legal issues that are decided by the court, not issues of fact to be decided by the jurors. Moreover, the trial court's instructions that the lawyers' comments and arguments are not evidence, and that the case should be decided on the basis of the evidence, were sufficient to dispel any possible prejudice. *Long, supra*. Accordingly, this claim does not warrant reversal.

IX. Effective Assistance of Counsel

Also, defendant alleges that defense counsel was ineffective because, during closing argument, he conceded defendant's guilt of the charged offenses.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

To support his claim, defendant relies on the following comment made during closing argument:

> You send any message that you want to send in this case. *If you think what happened here is right, then just convict him.* If you don't, then do what you need to do. [Emphasis added.]

Contrary to defendant's characterization of counsel's closing argument, defense counsel did not concede defendant's guilt. Rather, viewed in context, in the face of the overwhelming evidence that defendant possessed a large quantity of cocaine, defense counsel's decision to focus on the propriety of the police officers' actions was not unreasonable. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart (On Remand)*, 219 Mich App

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(…continued)

> just saying that you really--means to justify the end in the name of dope, in the name of police the ferreting out what they call crime, can they do anything they want? Can they trick people? Can they make people succumb to their will by their psychological pressure, or any means that they feel will bring them to where we are today. The reason we have juries, ladies and gentleman, is because you're the buffer between the government and the citizenry. And you're the one that sends a message to the government, and you're the one that sends a message to the police that you're [not] going to tolerate a certain type of conduct.

38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id*. Further, in light of the overwhelming weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted if trial counsel had not made this argument. *Effinger*, *supra*. Therefore, defendant cannot establish a claim of ineffective assistance of counsel.

X. Charging Discretion

We reject defendant's final claim that the prosecution abused its discretion by dividing "a single criminal episode" of possession with intent to deliver 50 or more but less than 225 grams of cocaine into two separate charges. "[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). The prosecutor has broad discretion to bring any charge supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). A prosecutor abuses his discretion only if "a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'" *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996).

The evidence showed that the two charges of possession with intent to deliver 50 or more but less than 225 grams of cocaine involved separate and distinct offenses. When the police seized the 104 grams of cocaine from defendant's person, he was not in his apartment, but had been a passenger in a car. Defendant had been at the Courtyard Marriott hotel in Auburn Hills, and possessed the drugs in that jurisdiction. The cocaine was separated in three separate bags that were in defendant's coat and pants pockets. Approximately $1,300, a pager, a cell phone, and a digital scale were also seized at that time. Defendant's separate charge of possession with intent to deliver 50 or more but less than 225 grams of cocaine was based on his constructive possession of approximately 75 grams of cocaine later found in his apartment in Waterford Township. In addition to the cocaine, there were drug tally sheets, approximately $4,000, and 1.4 grams of marijuana in the apartment. In short, defendant possessed two separate quantities of cocaine, in different contexts, and in different jurisdictions.

Moreover, defendant does not offer any information or evidence to show that the charges were brought for an unconstitutional, illegal, or illegitimate reason, so there is no basis to conclude that the prosecutor abused his power in charging defendant with separate drug offenses.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Helene N. White